to enforce an administrative subpena and has left no doubt regarding the type of defenses which the district court should consider.[4]

The summary reversal in the present case seems to ignore these standards and requires enforcement of the subpena merely because it was issued with proper formality. This seems to be directly contrary to the Congressional intent as expressed in the legislative history of Section 6(c). This legislative history is extensive; the important parts are set forth in the 423 pages of Senate Document No. 248, 79th Congress, 2nd Session:

Representative Walter, one of the sponsors in presenting the Committee Report to the House pointed out that this legislation was under consideration for more than 10

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[4]In *Tobin v. Banks and Rumbaugh*, 201 F.2d 223 (C.A. 5), cert. den., 345 U.S. 942, the Court of Appeals for the Fifth Circuit held that Section 6(c) was not intended to change the law set forth in *Endicott-Johnson* and *Oklahoma Press* as applied to a factual and legal issue exactly the same as that considered in *Oklahoma Press*. In reaching this result the Court of Appeals relied chiefly on the fact that predecessors of the bill which became the Administrative Procedure Act had contained a provision to the effect that in subpena enforcement proceedings the Court should "determine all relevant questions of law raised by the parties, including the authority or jurisdiction of the agency." Noting the omission of this phrase and the substitution of the phrase "in accordance with law", the Court stated that it could not "assume that this deliberate substitution of language in view of the existing law, was not intended to define with exactness the limits of the inquiry in judicial enforcement proceedings". (201 F.2d at 226.) Presumably the Court overlooked the statement made in connection with the Senate Committee Print of the bill finally enacted, to the effect that the substituted language meant the same thing as the language replaced (Senate Document 248, p. 28, infra). In any event, the *Tobin* decision, which dealt with precisely the same issue as *Oklahoma Press*, is no authority for expansion of the *Oklahoma Press* principle. If the *Tobin* decision is to be construed as a broad holding that Section 6(c) left the law exactly where it found it, it plainly conflicts with the legislative history cited below.

years. He went on to say, "certainly no measure of like character has had the painstaking and detailed study and drafting. Both the legislative and executive branches have participated and private interests of every kind have had an opportunity to present their views." (Senate Document 248, p. 241.)

The legislative history of the phrase "in accordance with law" reflects some of the views of these private interests. It meets them by saying that "in accordance with law" means "that no administrative subpena may be enforced beyond the lawful jurisdiction of the agency". The statement was made in connection with the Senate Committee Print of June, 1945. The full text is:

> "Private parties urge that after the word 'be' in the second sentence there be added, 'within the jurisdiction of the agency and otherwise', so that no administrative subpena may be enforced beyond the lawful jurisdiction of the agency. It is felt that 'in accordance with law' as now stated [in the revised text set forth above] means that. If adopted, the suggestion should be understood as not authorizing a complete pretrial in the courts of factual issues committed to exclusively administrative determination; courts should, instead, do no more than satisfy themselves that, legally upon the general factual situation shown, the agency has jurisdiction of the specific subject matter involved." (Senate Document 248, p. 28.)

This interpretation as requiring the courts to satisfy themselves that the agency has jurisdiction continues throughout the legislative history; for example, House Committee Report of May 3, 1946, stated:

"The section constitutes a statutory limitation upon the issuance or enforcement of subpenas in excess of agency authority or jurisdiction, in connection with any agency function or authority. It does not mean that upon contest courts should enter into a detailed examination of the facts and issues which are committed to agency authority in the first instance; they should instead inquire generally into the legal and factual situation and be satisfied that the agency could lawfully have jurisdiction. The section expressly recognizes the right of parties subject to administrative subpenas to contest their validity in the courts prior to subjection to any form of penalty for noncompliance. In such contests, the court is required to determine all relevant questions of law." (Senate Document 248, p. 265.) The Senate Committee Report of November 19, 1945 is substantially identical. (Senate Document 248, p. 206.)

On May 24, 1946, when Representative Walter made the official explanation of the entire Act to the House, he said:

"Subsection (c) of section 6 provides that, where Congress has authorized agencies to issue subpenas, private parties may secure them upon an equality with Government representatives and without any more than a general showing of relevance and reasonable scope of the information sought. Where administrative subpenas are contested, the court is to inquire into the situation and issue an order of enforcement only so far as the subpena is found to be in accordance with law. This is a definite statutory right and is applicable to subpenas of every kind addressed to any person under authority of any law. The effect of the subsection is thus to do more than merely restate the existing constitutional safeguards which in some cases, such as those involving public con-

tractors—see *Endicott-Johnson Corp. v. Perkins,* (317 U.S. 501, 507, 509, 510 (1943)), have been held inapplicable. Also, the term 'in accordance with law' does not mean that a subpena is valid merely because issued with due formality. It means that the legal situation, including the necessary facts, demonstrates that the persons and subject matter to which the subpena is directed are within the jurisdiction of the agency which has issued the subpena." Senate Document 248, p. 363.)

At least one thing seems to be self-evident from this legislative history of Section 6(c). This one thing is the duty of a district court to act judicially and determine the authority or jurisdiction of the agency over the subject matter of the administrative proceeding before enforcing an administrative subpena. This is the logical inference from the fact that Section 6(c) is a statutory limitation upon the enforcement of subpenas in excess of agency authority or jurisdiction, from the statement that no administrative subpena may be enforced beyond the lawful jurisdiction of the agency, from the fact that the term "in accordance with law" does not mean that a subpena is valid merely because issued with due formality, and because Section 6(c) expressly recognizes the right of the parties subject to administrative subpenas to contest their validity in the courts.

It is difficult to imagine how the Congress could have been more explicit in expressing its intent that appropriate defenses may be made to applications to enforce administrative subpenas and that a subpena should not be enforced merely because it was issued with proper

formality. We have contended from the beginning that the purpose of the Federal Trade Commission in the present case is unlawful and that the Commission is acting in excess of its statutory authority. The right to present these defenses was denied to us by the District Court and is denied to us again under the per curiam reversal. These defenses may be overruled, but we should have a right to present them for judicial determination.

We do not suggest that a district court should undertake a "complete pretrial" of any factual issues (Senate Document 248, p. 28, supra), or a "detailed examination of facts and issues which are committed to agency authority." (Senate Document 248, p. 265, supra.) We contend that, without a trial of any factual issues and without the production of any evidence whatsoever, a district court could and should hold that the Federal Trade Commission has no power to regulate advertising of accident and health insurance. The basis of this contention is that such advertising is "regulated by State law" in every jurisdiction in which Fireman's Fund does business and that, under Public Law 15, the Federal Trade Commission has been divested of all authority to regulate insurance advertising already regulated by State law.

If this is a question of "coverage", as the Government insists, it is not coverage of Fireman's Fund but rather coverage of the specific subject matter of the proceeding, i.e., insurance advertising already regulated by State law. This question of jurisdiction "of the specific subject matter involved" is one of the things which Congress said should be considered before an administrative subpena is enforced (Senate Document 248, p. 28, supra). It is one

of the "relevant questions of law" to be determined by the district court (Senate Document 248, p. 265, supra). And yet, as we said before, the per curiam reversal denies us the right to have this defense considered in the present case. The defense may be overruled but we should be permitted to present it. Any other result is contrary to the unequivocal statement that Section 6(c) "constitutes a statutory limitation upon the issuance and enforcement of subpenas in excess of agency authority or jurisdiction in connection with any agency function or authority." (Senate Document 248, p. 265, supra).

The petition for certiorari urged that judicial consideration of this question on an application to enforce a Commission subpena would preclude the Commission from developing facts upon which the Commission itself could make this determination. The immediate answer to this argument is that Public Law 15 is not factual. The Commission may regulate the business of insurance to "the extent that such business is not regulated by State law"; or, to put it in the reverse, the Commission cannot regulate insurance advertising which is already regulated by State law. The question as Senator McCarran put it is simply, "Is this practice regulated by State law? Not, is it effectively regulated, or is it wisely regulated; but simply is it regulated?" (94 Congressional Record No. 11, p. A 3214.)

It is a matter of judicial notice that over three-fourths of the States adopted a so-called "Model Act" drafted by the National Association of Insurance Commissioners for the purpose of precluding Commission regulation of insurance advertising and the remaining States (including

the District of Columbia) have statutes in one form or another regulating such advertising. This regulation by State law does not depend upon individual facts in individual cases. There are no facts to be developed by the Commission in this case or any other case under Public Law 15 upon which the Commission's authority to regulate insurance advertising might depend.

The judgment of the United States Court of Appeals for the Ninth Circuit in the present case did two things. First, it interpreted Section 6(c) as requiring a district court to consider agency authority before enforcing a subpena (244 F.2d, at page 891 and page 895). This portion of the judgment seems to be clearly in accord with the legislative history quoted above. However, since the Court of Appeals deemed the subpena so broad that the issue was not properly presented for decision, it ordered the proceedings dismissed. (244 F.2d at page 895). The per curiam decision of this Court, as we understand it, reverses on both grounds, and reinstates the original order of the district court enforcing the subpena. The district court's interpretation of Section 6(c) is now approved and the subpena will be enforced merely because it was issued with due formality. We think that such a sweeping rejection of explicit legislative history should not be made without a full hearing on briefs and oral arguments. Even if a full hearing still results in a reversal it could give us the rights which Congress apparently intended us to have and reinstate the proceedings with instructions to the district court to consider whether State statutes have divested the Commission of power to regulate insurance advertising.

Further, a rehearing in the present case would permit this case to be correlated with *Federal Trade Commission v. National Casualty Company*, October Term, 1957, No. 435, and *Federal Trade Commission v. The American Hospital and Life Insurance Company*, October Term, 1957, No. 436. Both of these cases, as we said before, deal with the basic issue which we wish to present in our case; in other words, whether Public Law 15 is to be construed as divesting the Commission of jurisdiction over insurance advertising because of the enactment of State laws regulating such advertising. If certiorari should be granted in these two cases, all three cases might well be argued together.

CONCLUSION.

We respectfully request that a rehearing with full opportunity for briefs and oral argument be granted to prevent an interpretation of Section 6(c) which appears to be contrary to the intent of Congress as expressed in the legislative history quoted herein. Such a rehearing will also permit the Court to correlate this case with the related cases now pending on petitions for certiorari.

Dated, November 5, 1957.

Respectfully submitted,

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Attorneys for James F. Crafts, Respondent.

Certificate of Good Faith.

Christopher M. Jenks, counsel for Respondent James F. Crafts, hereby certifies that this Petition for Rehearing is presented in good faith and not for delay.

Dated, November 5, 1957.

Christopher M. Jenks.